Ministry of the
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General

Discussion Paper on Occupiers' Liability and Trespass to Property

May, 1979

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Foreword

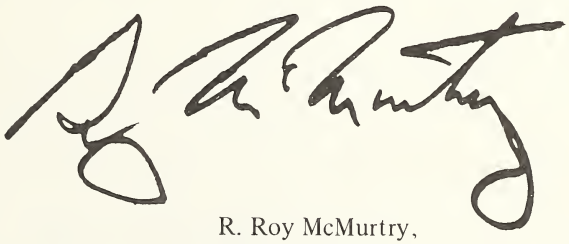
Two different but related areas of law are in need of reform: the law governing an occupier's liability to those who come onto his land and the law protecting an occupier from trespass to his land. The general dissatisfaction with the existing law in each of these two areas has been brought to my attention by the Ontario Federation of Agriculture and by the Ontario Trails Council. Many other groups and individuals have also made submissions to me.

To adequately serve the needs of Ontario residents, the law must take into account the diversity and complexity of this province. The law must meet the needs of residents of wilderness regions, agricultural communities, areas relying on the tourist industry and urban centres. The proposals made in this discussion paper are an attempt to meet the needs of all Ontario residents.

The discussion paper is divided into two parts: the first dealing with the law of occupiers' liability; and the second dealing with the offence of trespass. Each part presents the problems with respect to that area of the law followed by a discussion of the government's proposals for legislation to resolve the problems. The appendices contain a summary of the proposals, draft legislation based on the proposals and the existing *Petty Trespass Act.*

Many individuals and organizations would be affected if these proposals were to become law. There should be opportunity for public discussion and for individuals and groups to make their views known. I hope to introduce legislation in the fall to deal with these important issues.

Comments, briefs and suggestions should be sent by June 30th, 1979, to the Policy Development Division, Ministry of the Attorney General, 17th Floor, 18 King Street East, Toronto, Ontario M5C 1C5.



R. Roy McMurtry,
Attorney General.

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Part I
Occupiers' Liability

A. PROBLEMS

There are two major problems that arise out of the existing law of occupiers' liability. First, the law is excessively complex, thereby diminishing its usefulness to the public. Second, the present law does not adequately protect benevolent occupiers who are willing to permit recreational activities to take place on their land.

PROBLEM 1. THE EXISTING LAW: COMPLEX AND CONFUSING

An occupier of land, whether owner or tenant, has a duty to take care that persons entering his land are not injured. In Ontario, the extent of that duty has primarily been established by judge-made common law. The common law principles relating to occupiers' liability are complex. To further complicate the matter, since the 1974 decision of the Supreme Court of Canada in the case of *Mitchell* v. *Canadian National Railway Co.,* the law itself has been in the process of change. While the direction of change is ascertainable, it is difficult to give a simple but precise statement of the evolving law. The judges have found it necessary to modify the traditional law in order to arrive at decisions which are fair by twentieth century standards.

Traditionally, the standard of care an occupier was required to show to prevent injury to a non-contractual entrant depended upon whether the person entering was classified as an invitee, licensee or trespasser. It would seem that in recent cases the courts have retained the system of classifying entrants, but have increased the standard of care owed by an occupier to licensees and trespassers. An attempt is made below to compare the traditional law with the evolving law:

(a) An "invitee" has been defined as "a lawful visitor from whose visit the occupier of land stands to derive an economic advantage." An example is a shopper who enters a retail shop and who may make a purchase. Since the shopkeeper has a financial interest in the presence of the entrant, the law requires that a high standard of care be shown to such entrants.

An occupier must use reasonable care to prevent damage to an invitee from unusual dangers of which he knows or ought to know. The occupier is under an obligation to make reasonable inspection of the premises to ascertain existing dangers and to eliminate them. This is a high standard of care which has not been the subject of recent judicial reinterpretation.

(b) A "licensee" is a person who enters on the occupier's land with permission but whose presence is not of economic advantage to the occupier. An example is a house guest. Prior to the Supreme Court of Canada's decision in the *Mitchell* case, *an occupier's duty to a licensee was limited to warning him of concealed dangers of which the occupier knew; no duty arose in respect of obvious dangers.*

Since *Mitchell,* the courts have been attempting to establish a new standard of care to licensees. The Ontario Court of Appeal reconsidered the law in the case of *Bartlett* v. *Weiche Apartments Ltd.* (1974). Mr. Justice Jessup expressed the view of the Court of Appeal regarding the standard of care an occupier owes to a licensee as follows:

> "It is to take reasonable care to avoid foreseeable risk of harm from any unusual danger on the occupier's premises of which the occupier actually has knowledge because he was aware of the circumstances."

(c) A trespasser is a person who enters land without the permission of the occupier. A person can be a trespasser without knowing it. For example, where a person has every reason to believe that he is on a public road, but is actually on a private road, he will still be a trespasser. Historically, *an occupier has been found liable to a trespasser for injuries only if the occupier created a danger with the deliberate intent of doing harm or damage to the entrant or did a wilful act with reckless disregard of the presence of the entrant.* In 1974, a new duty of care to trespassers was created by the Supreme Court of Canada in the case of *Veinot* v. *Kerr-Addison Mines Ltd.* The new duty has been called a "duty of common humanity" and remains very vague. Mr. Justice Martland stated the duty as follows:

> ". . . an occupier who knows of the existence of a danger upon his lands which he has created, or for whose continued existence he is responsible, may owe a duty to persons coming on his land, of whose presence he is not aware, if he knows facts which show a substantial chance that they might come there. . .such duty, when it exists, is limited, in the case of adults, to a duty to warn. In the case of children, something more may be required. The existence of a duty will depend on the special circumstances of each case."

In order to avoid unfairness caused by the rigidity of the category system, the courts have "stretched" all of the categories. For example, the courts have found that an individual was an invitee rather than a licensee in situations where there was no direct economic advantage to the occupier. To minimize the hardship of the trespasser rule, especially in the case of children, the courts invented the legal fiction of an "implied licence." Where a child entered premises without permission because his interest was aroused by some attraction on the land, the courts have held that he had an "implied licence" to enter. Thus, although the child was in fact a trespasser, he was treated as a licensee for the purpose of determining the occupier's liability.

This needless legal complexity cannot help but result in public confusion as to the care that an occupier of premises must take to protect entrants from injury and himself from liability. At one time, the category system served to provide some certainty as to the likely outcome of litigation and thus prevented needless litigation. However, the recent judicial interpretations of the category system have significantly blurred the distinctions between the categories. Accordingly, the category system no longer has sufficient certainty to prevent needless litigation. Restoring the category system to its former strictness would not be desirable, since it was partly based on a system of values that gave pre-eminence to property rights.

PROBLEM 2. THE BENEVOLENT OCCUPIER AND RECREATIONAL ACTIVITIES ON PRIVATE LAND

The desirable growth of outdoor recreational activities has had some undesirable effects. Urban residents have flocked in ever increasing numbers to the countryside. In the countryside, farmers and other occupiers of land have become fearful of being sued for damages by persons who might be injured while engaged in recreational activities on their land. This fear reached a high point following the Supreme Court of Canada decision in *Veinot* v. *Kerr-Addison,* in which damages were awarded to an operator of a motorized snow vehicle who was injured while on private property. In part because the unusual facts of the case were not properly publicized, occupiers of rural land felt that the decision might herald a real threat to the interests of occupiers of rural land. The Legislature acted quickly to allay these fears by enacting *The Motorized Snow Vehicles Act, 1974.* That Act, among other things, provides that occupiers of land are not liable for injuries to snowmobilers, whether or not motorized snow vehicles are permitted on the land, unless the occupier creates a danger with the deliberate intent of doing harm or damage to the entrant, or the occupier does a wilful act with reckless disregard of the presence of the entrant. Fear of liability for injury to persons entering land has been greatly reduced by the passage of *The Motorized Snow Vehicles Act,* but, with respect to other recreational activities, it remains an important concern of occupiers of land in every part of the province.

It will be recalled from the discussion of the existing law that if a person is permitted onto land, he becomes a "licensee" and the occupier is under a duty at least to warn him of dangers. Thus, at present, an occupier owes a greater duty to persons he permits to use his land for recreational activities than he does to trespassers. This penalizes the occupier who is willing to permit recreational activities on his land. It discourages benevolence. Recreational trails of all kinds depend heavily on the use of private lands. Trail associations have had difficulty in obtaining the consent of occupiers, because the occupiers are afraid of potential liability.

The Ontario Trails Council studied the problems related to the availability of rural land for recreational trail use. In its final report, it stated the changes in the law that are desirable to encourage private landowners to make their land available for recreational trail activities (see page 38 of the Council's Report):

"It is important to limit the landowner's liability:

a) towards persons entering his land who may be injured;

b) towards property which may be damaged by people entering on the land;

c) towards persons injuring one another while on private land."

It would appear desirable to give benevolent landowners the protection recommended by the Ontario Trails Council.

B. PROPOSALS & DISCUSSION

Each of the proposals is set out below with a discussion of the reasons for it being proposed. Individuals and groups are invited to consider these proposals in detail and to send written submissions regarding them to the Ministry of the Attorney General before June 30th, 1979.

1. DUTY OF REASONABLE CARE

It is proposed that:

The numerous duties of care that an occupier of land now owes to entrants to his land be replaced by legislation imposing one duty of care on all occupiers: to take such care as in all the circumstances is reasonable to see that persons entering on the premises are reasonably safe while on the premises.

This duty of care not apply to a person entering premises for criminal purposes. These persons be deemed to have willingly assumed the risk of injury.

There is no doubt that the existing law requires reform (see Problem 1). The Ontario Law Reform Commission, in its Report on Occupiers' Liability (1972), recommended the enactment of legislation imposing on occupiers one common duty of care. *The Uniform Occupiers' Liability Act* (1972), proposed by the Uniform Law Conference of Canada, also took this approach. Scotland has had a law imposing a common duty of care on all occupiers since 1960 and British Columbia since 1974. The enactment of a common duty of care is a prerequisite to any real reform in this area of the law.

The proposed duty of care would result in the same approach being taken to determine an occupier's liability for injury to entrants on his premises as has applied to injuries caused elsewhere since the development of the law regarding liability for negligent actions. Beginning in 1932 with the decision of the English courts in the case of *Donoghue* v. *Stevenson,* the law of negligence has developed so as not to depend on fixed categories of situations in which a duty of care exists. Rather, the courts have stated the broad principle that a person must take reasonable care to avoid acts which he can reasonably foresee would be likely to injure other persons directly affected by his actions. By creating a similar duty of care for occupiers, the courts would no longer need to resort to ranking claimants in a rigid category system, or involve themselves in interpreting the new duties that are not yet clearly articulated. These matters are now obstructing attempts to determine claims. The proposed law will only require the occupier to do what is reasonable in all the circumstances. The proprietor of a shop will still be required to take greater care than a housekeeper. The care that is reasonable for a railway company running a main line through a town is not the care that is reasonable for the owner of a private road in an isolated location.

The new common duty of care should more closely reflect the actual considerations of individual occupiers than does the existing law.

Some persons have expressed the view that no duty of care should be owed to trespassers. However, it must be remembered that many trespassers are innocent of any real wrongdoing. For example, it would be unfair to deny

compensation to a curious child who was injured on a construction site if no precautions had been taken to prevent persons from entering the premises. Similarly, most people in today's society would agree that, where the owner of a parking lot knows that his property is frequently crossed by pedestrians, he should be liable for any injuries that result from unmarked watermain excavations, or other dangers which the occupier knew were likely to cause harm.

There is one group of trespassers which does not deserve any more than minimal protection. Where a person enters premises for criminal purposes, he should be deemed to have assumed his own risk of injury and the occupier should be relieved from liability. However, since the beginning of the nineteenth century, the courts have refused to permit occupiers to use unnecessary violence in protecting their property. Therefore, in keeping with the existing law, the relief from liability should not extend so far as to protect an occupier who creates dangers that are deliberately intended to cause harm or acts in reckless disregard of the entrant's presence. The minimal protection given to criminal entrants is designed to deter occupiers from themselves committing criminal acts by setting traps that could cause injury or death.

It should be noted that the proposed system would not change the law respecting motorized snow vehicles. As indicated previously, *The Motorized Snow Vehicles Act* provides that an occupier of land owes no duty of care to a snowmobiler other than to not create dangers with the deliberate intent of doing harm and to refrain from acting with reckless disregard for the snowmobiler's presence. *The Motorized Snow Vehicles Act* would continue to apply to all land.

2. TRESPASS AND RECREATIONAL ACTIVITIES ON DESIGNATED CLASSES OF LAND

It is proposed that:

To protect the interests of the agricultural community, and to promote the availability of land for recreational activities, special protection be given to occupiers of certain designated classes of land. Where entry is prohibited to these lands, or where entry is permitted for recreational activities without charge, the occupier's liability be limited to dangers created with the deliberate intent of causing harm or acts done with reckless disregard for the entrant's presence. The entrant be deemed to have willingly assumed all other risks.

The following be included in the designated classes of land:

- **(a) land used for agricultural purposes, including land under cultivation, orchards, pastures and woodlots;**
- **(b) vacant or undeveloped land;**
- **(c) forested or wilderness land;**
- **(d) golf courses in winter;**
- **(e) unused or abandoned railway beds;**
- **(f) utility rights-of-way and corridors, excluding structures located therein;**

(g) undeveloped road allowances;

(h) private roads reasonably marked by notice as such;

(i) marked recreational trails.

As was discussed in the Problem section (see Problem 2), in order to encourage private landowners to voluntarily make their land available for recreational activities, it is desirable to limit their potential liability. However, in protecting occupiers from liability, great care must be taken to ensure that the limitation of liability will not create unreasonable dangers for members of the public.

The proposed provision is limited to persons entering land where entry is prohibited and persons who are permitted, without charge, to use the land for recreational activities. In such cases, the only duty on the occupier would be to avoid creating dangers deliberately intended to cause harm and to avoid acting with reckless disregard for the entrant's presence. With respect to persons prohibited from entering, the rural occupier would be under the same duty as applied to trespassers prior to the *Veinot* case. With respect to persons permitted to use the land, without charge, for recreational activities, these persons have usually assumed that they are responsible for their own injuries, though the existing law would technically consider them as licensees. They are grateful for the privilege being extended to them. The proposal that such entrants would assume their own risks seems to accord with the usual expectations of those who pursue recreational activities on private land.

It should be noted that a rural occupier of land would be subject to the ordinary duty of care towards employees, business associates, house guests and others who enter with permission to use the premises for other than recreational activities.

The types of land designated exhibit characteristics which make it reasonable that the recreational entrant assume his own risk. Such lands do not generally pose extraordinary or unexpected dangers to users, although undoubtedly some risks are involved. Indeed, the recreational entrant who is engaged in adventuresome activities such as rock climbing may be seeking some element of risk. These risks are expected. Wilderness and undeveloped land are such that an occupier cannot reasonably be expected to tend them in order to prevent injury to an entrant. Persons who enter on these lands for recreation are seeking the solitude that such lands provide and not the activities that can be found in a safe public park. It should be noted that with respect to utility corridors the assumption of risk by the entrant does not extend to structures located on the corridor. With respect to structures, the utility would be required to take reasonable care that entrants are not injured.

An examination of the case law indicates that lawsuits are almost never brought against the owners of these designated classes of lands. Providing that individuals who use these lands for recreational activities do so at their own risk would appear to be a desirable course of action.

The proposal, if implemented, would limit the liability of occupiers of the designated classes of land toward persons prohibited from entering and those who are permitted, without charge, to engage in recreational activities. This would effectively implement the recommendations of the Ontario Trails

Council concerning liability for personal injuries, liability for damage to property the entrant brings on the premises, and liability where one entrant injures another while on the premises. Under the proposed scheme, each of these types of liability is excluded unless a risk of danger is created by the occupier with the deliberate intent of doing harm to the entrant or his property or the occupier does a wilful act with reckless disregard of the entrant's presence. There would be no liability for personal injuries to the entrant because the entrant is deemed to assume his own risk and the occupier's duty of care does not apply when the entrant assumes his own risk. The occupier would not be liable for damage to property brought on the premises by the entrant because the duty of care, which requires reasonable care for the property brought on the premises by the entrant, does not apply where the entrant assumes all risks. The occupier would not be liable to an entrant for injuries caused to the entrant by another entrant. Both the entrant causing the injury and the entrant who received the injury are deemed to have assumed their own risk for the purpose of determining the liability of the occupier. However, this would not prevent the injured entrant from suing the person who caused the injury. Only the occupier would be protected by the provision.

It is felt that the proposed approach would effectively remove the occupier's risk and thereby encourage private landowners to voluntarily make land available for recreational activities.

Part II
Trespass to Property

A. PROBLEMS

There are a number of problems which result from the inadequacy of *The Petty Trespass Act.* First, the wording of the existing offence is unclear and, along with other factors, leads to difficulties in prosecution. Second, the law does not deter trespass onto land under cultivation even though significant farm losses are caused by trespassers. Third, the Act does not ensure the privacy of occupiers of land or permit the control of recreational activities.

PROBLEM 1. DIFFICULTY OF PROSECUTING UNDER *THE PETTY TRESPASS ACT*

Early in the history of Ontario, it was found that a civil lawsuit was too cumbersome a method for enforcing an occupier's right to exclude trespassers. A relatively quick, cheap and intelligible remedy was necessary. The first petty trespass legislation was enacted in 1834, legislation which does not replace the common law civil remedy but co-exists with it.

The Petty Trespass Act which is in force today is very similar to the Act passed in 1834. In the intervening 145 years, the province has totally changed. The Act has been showing its age.

One of the difficulties associated with *The Petty Trespass Act* is the vague wording of the offence section. Under section 1(1) of the Act, a person commits an offence if he "unlawfully enters or in any other way trespasses upon another person's land." It is unclear, however, what is meant by the phrase "unlawfully enter." For example, the courts have suggested that it is unlawful to enter a high school for the purpose of selling newspapers, but that it could be lawful for members of the public to enter for other reasons. Another difficulty arises with the phrase "another person's land." This would seem to imply that only an owner can prosecute trespassers. However, the courts have held that occupiers who are not owners can also prosecute trespassers. This is a desirable result, since it allows tenants to use *The Petty Trespass Act* to protect their privacy from trespassers. However, this result is only reached by stretching the words of the statute considerably. It would be preferable to rewrite the offence of trespass in more precise language.

There are a number of other difficulties involved in the prosecution of trespassers. Because prosecution by the Crown of most provincial offences would be prohibitively expensive, most prosecutions under *The Petty Trespass Act* are undertaken by the occupier, although brought in the name of Her Majesty. An occupier who wishes to charge a trespasser must, therefore, either prosecute the case himself and suffer from his lack of expertise, or incur the expense of hiring a lawyer.

If a prosecution is successful, the fines are payable to the Treasurer of Ontario. Thus, the occupier does not collect any fine levied as a result of his private

prosecution. The occupier has no assurance that he will even recover the costs of the prosecution because, at present, costs are awarded at the discretion of the court.

Another difficulty facing an occupier wishing to prosecute a trespasser is the fact that there is no provision in the existing *Petty Trespass Act* for awarding damages to the owner or occupier. Even unintended instances of trespass can result in damage to the occupier. For example, horseback riding across fields may result in damage to crops.

A final problem associated with prosecuting under *The Petty Trespass Act* concerns the small fines that are imposed. The $100 maximum fine does not appear to be a sufficient deterrent. Because trespass is often viewed as a relatively harmless offence, a conviction under the Act often results in a fine much less than the maximum. While trespass to vacant lands is often harmless, trespass on agricultural lands, including orchards, often accompanies acts of theft and vandalism. Millions of dollars in lost revenue are suffered by farmers each year. Raising the maximum fine might assist in preventing these losses.

PROBLEM 2. TRESPASS TO LAND UNDER CULTIVATION

Farm businesses represent substantial investments of capital. Trespass to orchards and land under cultivation results in substantial business losses to the agricultural community. Vandalism and theft are not uncommon. The technical difficulties of prosecuting trespassers mentioned above have meant that there is no effective deterrent to trespass on cultivated land. Of course theft, whether of crops or livestock, is a criminal offence and is prosecuted as such. However, such thefts are difficult to prove, and it is advisable to take steps to deter trespass in order to reduce the opportunity for theft and vandalism.

The Petty Trespass Act requires that before a person can be prosecuted for entry on agricultural land he must have notice that trespass is prohibited or the land must be enclosed or posted with signs. Modern agricultural techniques to maximize crop yields have resulted in the removal of existing fencing from fields and orchards. Maintaining the posting of large open areas is impractical. Since orchards are visible at all times of the year and cultivated fields can be seen to be under cultivation in all but part of the winter, there appears to be no need for notice.

PROBLEM 3. ENSURING OCCUPIERS' PRIVACY AND CONTROL OF RECREATIONAL ACTIVITIES

Occupiers of land must continue to have every right to choose for themselves how far they wish to share the use of their land with others, if at all. *The Petty Trespass Act* prohibits entry on lawns, gardens and enclosed lands. It provides that entry can be prohibited from other premises through the giving of oral or written notice and the posting of signs on the land. These rights of occupiers to privacy should be enhanced.

Signs are difficult to erect and maintain and are vulnerable to vandals. There is, at present, no simple method of marking land to inform possible entrants that entry is prohibited. There appears to be a need for such a system which can be backed up by prosecution if necessary.

Although the Ministry of Natural Resources has begun the task of establishing a standard system of signs for recreational activities, the law has not given legal meaning to the signs and has not provided a mechanism for enforcing them. The misuse of trails has been a source of aggravation to occupiers of land and to trail organizations. A few ignorant and inconsiderate individuals should not be permitted to destroy the recreational activities of others. Responsibility on the part of those engaged in recreational activities on public land, and on private land on which they are permitted, must be encouraged. Irresponsible behaviour must be deterred. The law of trespass could be used to deter irresponsible recreational activity.

The Ontario Trails Council recommended the establishment of a positive entry system onto land, that is, the posting of a sign indicating that a recreational activity is permitted should be sufficient to prohibit all other activities. This recommendation has not yet become part of the existing law.

B. PROPOSALS & DISCUSSION

Each of the proposals is set out below with a discussion of the reasons for it being proposed. Individuals and groups are invited to consider these proposals in detail and to send written submissions regarding them to the Ministry of the Attorney General before June 30th, 1979.

3. CLARIFICATION OF THE OFFENCE OF TRESPASS

It is proposed that:

The ambiguous wording of the existing Petty Trespass Act be replaced with three specific offences:

(1) without express permission, the proof of which rests upon the accused, entering premises where entry is prohibited;

(2) without express permission, the proof of which rests upon the accused, doing an activity on premises when the activity is prohibited; and

(3) refusing to leave premises after being directed to do so.

The need to revise *The Petty Trespass Act* to clarify its purpose and effect is obvious (see Problem 1). Analysis of the cases which have been decided under that Act and consideration of the need to control unlawful entry indicates that there are three separate but related offences.

The first offence is the most obvious: entering premises where entry is prohibited, without express permission to do so. An example is the person who enters an area of a building which is set aside for staff and which is posted as such. This should be an offence unless there is specific permission to enter the area. The permission could be given orally as in the case of a shopper who is

searching for a toilet and who is directed by an employee to use the staff facility. The permission could also be in writing, for example, a pass to enter an otherwise off-limits area. The onus of proving permission is placed on the entrant because otherwise the prosecutor would have the difficult task of proving a negative or, in other words, proving that permission was not given. Once the prosecutor has proven that the accused was on premises where entry was prohibited, the accused should be required to prove that he had express permission to be there. This offence would protect premises of all types from unwanted intruders.

The second offence is designed to deter individuals from engaging in prohibited activities even where they have lawfully entered. For example, if land is posted with signs indicating that hiking is permitted but hunting is prohibited, a person who entered as a hiker would be guilty of an offence if he subsequently engaged in the prohibited activity. Once again, it would be possible to show that express permission to hunt had been given, but the responsibility for proving the existence of this permission would be on the accused.

The third offence is failing to leave premises after being told to do so. A person should leave premises when requested to do so by the occupier. This is true even where the entrant has done no wrong. Where, for example, the entrant has paid for the right to use premises, as has a ticket holder at a theatre, there may be rights to claim a refund or damages as a result of being required to leave. The prevention of breaches of the peace requires that persons leave first and argue afterwards.

4. TRESPASS TO AGRICULTURAL LANDS

It is proposed that:

In addition to the present classes of land on which entry is prohibited without notice (gardens, lawns and enclosed land), entry on fields under cultivation or orchards be considered unlawful without any notice that entry is prohibited.

As discussed earlier (see Problem 2), there is a need to protect those in the business of agriculture from business losses which result from crop destruction and theft by trespassers. The existing law which prohibits entry to enclosed lands is no longer sufficient to provide adequate protection. This proposal would result in entry being prohibited without notice to gardens, lawns, enclosed land, orchards and fields under cultivation.

The words "fields under cultivation" have tentatively been selected to describe lands on which crops are grown. Orchards are specifically mentioned. It is intended that the prohibition of entry without notice would not apply to forested land. Occupiers of these lands who wish to prohibit entry could do so easily by employing the marking system discussed below.

One potential problem which exists with respect to a prohibition of entry on fields under cultivation is that when the land is covered with snow it may be difficult to determine whether it is under cultivation. However, it is anticipated that this will not cause a serious problem. *The Motorized Snow Vehicles Act* prohibits entry on land by snowmobiles unless written permission has been

obtained from the occupier. The only other potential entrants on land that is heavily snow covered would be cross-country skiers and snowshoers. Prosecution by an occupier of a skier or snowshoer under these circumstances is most unlikely.

One modification of the law is contemplated with respect to enclosed lands. Under the existing law it is an offence to enter without permission on "enclosed lands." In 1834, when the first petty trespass legislation was enacted, land that was fenced was recently fenced, and there could be no doubt of what was intended. Today, however, many stone and stump fences are merely the remnants of long-deserted homesteads. Some of these fences lie in, or across, publicly acquired land on which entry is invited. It is desirable to clarify the type of fencing that will prohibit entry. It is proposed that entry be prohibited without notice where land is enclosed in a manner which indicates the intention of the occupier to keep persons off or to keep animals on the premises. Thus, the fencing around a pasture, or the fencing around a swimming pool, would prohibit entry without notice, but the remnants of a stone fence surrounding now vacant land would not.

5. METHOD OF GIVING NOTICE

It is proposed that:

(1) Where notice is required to inform persons that entry is prohibited, or to specify recreational activities that are permitted, the existing system of giving notice orally, in writing or by means of signs be retained.

(2) To promote the availability of land for recreational activities but allow the occupier full control over the activities permitted on his land, a system of interpreting signs be created. The system be set up to allow the occupier to permit particular activities (the "positive entry" system) or to prohibit particular activities (the "negative entry" system).

(3) A new method of giving notice that entry is prohibited be created. Coloured markings, placed at the ordinary entry points of the premises, be assigned the following meanings:

(a) red markings mean that entry is prohibited;

(b) yellow markings mean that entry is prohibited except for certain activities, and that it is the responsibility of the person entering to discover which activities are permitted.

(1) It must be recognized that it is often difficult to determine whether one is a trespasser. Entry is invited onto private property such as shops, shopping plazas and service stations. Even in rural areas, a person may begin a walk on public land over which he has a right to enter and cross without warning onto private property where his presence is unwelcome. It is only proper that before a person may be prosecuted for trespass, he must either be informed that he is a trespasser, or the factual situation must make it relatively clear that entry is prohibited. The existing law assumes that where land is a garden, lawn or is enclosed, the public should know without being given additional notice that entry is prohibited. Proposal 4

is based on the assumption that under present circumstances, the public should know that entry is prohibited without notice on fields under cultivation and orchards. Entrants to those types of land without permission should be subject to prosecution. Under the existing *Petty Trespass Act*, if notice is required, it can be given orally, in writing, or by means of signs so placed as to be visible from every point of access to the land. It is proposed that this law be retained.

(2) One of the main problems faced by occupiers of land who are willing to allow some recreational activities on their land is how to prevent other undesired activities (see Problem 3). It is a critical problem for trail associations who are given permission to establish a trail on land. Failure to control unwanted activities may result in the occupier's withdrawal of permission to use his land.

Part of the problem is the non-existence of a code to specify the legal meaning of signs in current use. For example, what does a "No fishing" sign mean? Does it merely indicate that the occupier could not find a "No trespassing" sign at the store? It appears desirable to provide a code to specify the meaning of signs prohibiting or limiting access to premises.

The Code:

(a) The code would provide that entry is prohibited where signs are posted to that effect. Thus, it would be an offence to enter where a sign, for example, stated "No trespassing", "No entry", "Entry prohibited" or "Keep out."

(b) The code would create the positive entry system recommended by the Ontario Trails Council (see its Final Report at p. 18, Recommendation 57). The positive entry concept would allow an occupier to place signs indicating those recreational uses that are permitted. The code would provide that a sign indicating that a particular activity is permitted means that all other activities are prohibited. The code would also provide that a sign stating the name of an activity, or containing a graphic representation of an activity, is a sign indicating that the activity is permitted.

Thus, if an occupier granted permission to use his land for horseback riding but no other activity, a sign "Horseback riding", or a graphic illustration of the activity, could be posted. All other activities would be prohibited and persons engaged in other activities could be prosecuted.

(c) With respect to trails such a positive entry concept is practical. Certain activities are incompatible with others and the permitted uses can be signified. However, where there is a desire to open large tracts of land to general recreational use with a few exceptions, it would be far less expensive and more convenient to list the prohibited rather than the permitted uses. For example, if a thousand acres are to be opened to all uses except fishing, it would be more practical to signify the prohibited uses.

To facilitate the negative entry concept, the code would provide that a sign indicating that a particular activity is prohibited means that all other activities are permitted. The code would also provide that a

sign stating the name of an activity, or containing a graphic representation of an activity with an oblique line drawn through the name or through the representation, would mean that the activity is prohibited.

The creation of the code in the legislation would facilitate the prosecution of those who do not respect the rights and privileges of others. When combined with the increased fines, liability for damages and the requirement that the convicted trespasser pay the costs of prosecution, all of which are discussed below, there would be a very significant deterrent to irresponsible behaviour.

(3) The posting and maintaining of signs whether containing writing or graphic representations can be difficult and expensive. Signs are vulnerable to the elements and to vandals. There is a need for a method of giving notice that entry is prohibited which is inexpensive to establish and maintain (see Problem 3).

It is proposed that legal meaning be given to markings in two colours, red and yellow. Markings could be made with paint, or other low cost materials, and could be placed on existing features of the land such as trees, remaining sections of fencing or the tops of posts. Under the proposal, it would be sufficient if each marking was 10 centimetres (approximately 4 inches) in diameter and a marking was clearly visible in daylight under normal conditions from the approach to every ordinary point of access to the land. It would not be necessary as a condition to prosecution that unusual places of entry be marked. Where entry is prohibited to open areas, it would be sufficient if markings were placed so that one marking could clearly be seen from another.

Red and yellow have been selected because they have international meanings similar to those they have in the proposed system. Red is used as notice that entry is prohibited. Yellow is used to indicate that caution is required. A yellow marking would mean that entry is prohibited except for certain activities, but the entrant would be deemed to have notice of which activities were permitted. Thus, where premises were posted with yellow markings, it would be the responsibility of the person wishing to enter to discover which activities were permitted. He would do this by looking for explanatory signs or, if there were no signs, by contacting the occupier directly. If an entrant engaged in an activity that was not permitted, he could be prosecuted.

Children are taught at an early age the primary social meaning of red and yellow. The additional meaning to yellow markings could also be taught in schools. Coloured markings should have a more powerful impact on children than written signs.

The occupier of land who wishes to prohibit entry on his land would find that marking his land with red markers is an easier method of giving notice of his intention to exclude entrants than the existing system of posting signs. As stated earlier, the existing system would also be retained.

The marking system and sign code should be of great assistance to recreational associations where an occupier agrees to permit a limited number of recreational activities on his land. An example will illustrate how the

sign code and marking system might be used by a trail association which is granted permission by an occupier to establish a hiking trail on his land:

> At major access points to the trail, signs could be erected either with a graphic representation of a hiker or with the word "Hiking" on them. All ordinary access points to the trail could be marked with yellow markings to indicate that the land could be used for a limited number of recreational activities. Places along the trail where hikers might stray onto farms, or other premises on which they were unwelcome, could be marked with red markings.
>
> The effects of this signage and marking scheme would be as follows. The signs indicating that hiking was permitted would, because of the code, be notice that only hiking was permitted and entrants engaged in other activities could be prosecuted. Destruction of the sign would not benefit persons who wished to engage in unauthorized activities, since the yellow markings, by themselves, would require entrants to be responsible for discovering which activities were permitted. A person entering to engage in an activity other than hiking would be liable to prosecution for wrongful entry. The red markings would warn hikers that they were straying off the trail and make them liable to prosecution if the hikers ignored the markings.

6. MAXIMUM FINE INCREASED

It is proposed that:

The maximum fine for trespassing be raised from the present $100 to $1,000.

The present maximum fine of $100 was established in the amendments of 1960-61. As discussed earlier (see Problem 1), the serious losses that can result from trespass now justify a higher fine. A maximum fine of $1,000 seems warranted.

7. COMPENSATION FOR DAMAGE

It is proposed that:

To make it easier for an occupier to collect compensation for damage caused by a trespasser, the judge who convicts the trespasser also be empowered to make a compensation order, in favour of the occupier, to a maximum of $1,000.

Where a trespasser causes actual damage to property, there is no present provision under *The Petty Trespass Act* for awarding damages to the owner or occupier. As stated earlier (see Problem 1), fines are payable to the Treasurer of Ontario. To recover damages, the occupier must bring an action in the Small Claims, County or Supreme Court.

Even unintended instances of trespass can result in damage to the occupier. For example, horseback riding across fields may result in damage to crops. It would seem reasonable to empower a provincial court judge to assess damages against a trespasser after a plea of guilty or a conviction. One thousand dollars

would seem an appropriate limit for a summary procedure like the one proposed, since $1,000 is the limit under *The Small Claims Court Act.* If damages in excess of $1,000 are occasioned, a civil action is appropriate. Of course, an occupier should not be able to bring two actions to the courts to recover damages. If he claims compensation at the court which convicts the trespasser, the legislation should prevent him from bringing another action in the Small Claims, County or Supreme Court based on the same incident.

8. COSTS OF PROSECUTION

It is proposed that:

To facilitate the prosecution of offenders, where a trespasser is successfully prosecuted by an occupier, the trespasser be required to pay the reasonable costs of the prosecution.

The proposal, if implemented, would ensure that where a private prosecution is successful the defendant would be liable for the occupier's reasonable costs in prosecuting. Provisions of this nature are found in the professional acts which permit a self-governing profession to recover the costs of investigating a complaint against a member of the profession where it is found that the complaint was warranted.

This provision could be used by trail associations and occupiers faced with serious problems of improper use of trails. The occupier of land permitting the trail activities could appoint members of the association to be his agents for the purpose of prosecuting persons who abuse the trail privileges. Because persons convicted would be liable for the reasonable costs of the prosecution, a trail association could retain counsel to prosecute. It is likely that a few successful prosecutions would be sufficient to deter improper trail use.

Appendix A
Summary of Proposals

The following proposals are put forward for public discussion. Individuals and groups are invited to consider these proposals and to send written submissions regarding them to the Ministry of the Attorney General before June 30th, 1979.

PROPOSALS: OCCUPIERS' LIABILITY

It is proposed that:

1. DUTY OF REASONABLE CARE

The numerous duties of care that an occupier of land now owes to entrants to his land be replaced by legislation imposing one duty of care on all occupiers: to take such care as in all the circumstances is reasonable to see that persons entering on the premises are reasonably safe while on the premises.

This duty of care not apply to a person entering premises for criminal purposes. These persons be deemed to have willingly assumed the risk of injury.

2. TRESPASS AND RECREATIONAL ACTIVITIES ON DESIGNATED CLASSES OF LAND

To protect the interests of the agricultural community, and to promote the availability of land for recreational activities, special protection be given to occupiers of certain designated classes of land. Where entry is prohibited to these lands, or where entry is permitted for recreational activities without charge, the occupier's liability be limited to dangers created with the deliberate intent of causing harm or acts done with reckless disregard for the entrant's presence. The entrant be deemed to have willingly assumed all other risks.

The following be included in the designated classes of land:

(a) land used for agricultural purposes, including land under cultivation, orchards, pastures and woodlots;

(b) vacant or undeveloped land;

(c) forested or wilderness land;

(d) golf courses in winter;

(e) unused or abandoned railway beds;

(f) utility rights-of-way and corridors, excluding structures located therein;

(g) undeveloped road allowances;

(h) private roads reasonably marked by notice as such;

(i) marked recreational trails.

PROPOSALS: TRESPASS TO PROPERTY

It is proposed that:

3. CLARIFICATION OF THE OFFENCE OF TRESPASS

The ambiguous wording of the existing Petty Trespass Act be replaced with three specific offences:

(1) without express permission, the proof of which rests upon the accused, entering premises where entry is prohibited;

(2) without express permission, the proof of which rests upon the accused, doing an activity on premises when the activity is prohibited; and

(3) refusing to leave premises after being directed to do so.

4. TRESPASS TO AGRICULTURAL LANDS

In addition to the present classes of land on which entry is prohibited without notice (gardens, lawns and enclosed land), entry on fields under cultivation or orchards be considered unlawful without any notice that entry is prohibited.

5. METHOD OF GIVING NOTICE

(1) Where notice is required to inform persons that entry is prohibited, or to specify recreational activities that are permitted, the existing system of giving notice orally, in writing or by means of signs be retained.

(2) To promote the availability of land for recreational activities but allow the occupier full control over the activities permitted on his land, a system of interpreting signs be created. The system be set up to allow the occupier to permit particular activities (the "positive entry" system) or to prohibit particular activities (the "negative entry" system).

(3) A new method of giving notice that entry is prohibited be created. Coloured markings, placed at the ordinary entry points of the premises, be assigned the following meanings:

(a) red markings mean that entry is prohibited;

(b) yellow markings mean that entry is prohibited except for certain activities, and that it is the responsibility of the person entering to discover which activities are permitted.

6. MAXIMUM FINE INCREASED

The maximum fine for trespassing be raised from the present $100 to $1,000.

7. COMPENSATION FOR DAMAGE

To make it easier for an occupier to collect compensation for damage caused by a trespasser, the judge who convicts the trespasser also be empowered to make a compensation order, in favour of the occupier, to a maximum of $1,000.

8. COSTS OF PROSECUTION

To facilitate the prosecution of offenders, where a trespasser is successfully prosecuted by an occupier, the trespasser be required to pay the reasonable costs of the prosecution.

Appendix B
Discussion Draft of Proposed Occupiers' Liability Act

This draft Act has been drafted for discussion purposes only. Individuals and groups are invited to consider the draft Act and to send written submissions regarding it to the Ministry of the Attorney General before June 30th, 1979.

BILL **1979**

An Act respecting Occupiers' Liability

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Interpretation

1. In this Act,

(*a*) "occupier" includes,

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

notwithstanding that there is more than one occupier of the same premises;

(*b*) "premises" means lands and structures, or either of them, and includes,

(i) ships and vessels,

(ii) trailers and portable structures designed or used for residence, business or shelter,

(iii) trains, railway cars, vehicles and aircraft, except while in operation.

Common law duty of care superseded

2. Subject to section 9, the provisions of this Act apply in place of the rules of the common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining his liability in law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons.

Occupier's duty

3.—(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

Idem

(2) The duty of care provided for in subsection 1 applies whether the danger is caused by the condition of the premises or by an activity carried on on the premises.

Idem

(3) The duty of care provided for in subsection 1 applies except in so far as the occupier of premises is free to and does restrict, modify or exclude his duty.

Risks willingly assumed

4.—(1) The duty of care provided for in subsection 1 of section 3 does not apply in respect of risks willingly assumed by the person to whom the duty is owed.

Trespass and permitted recreational activity 1979, c. ...

(2) A person who enters lands described in subsection 3,

(*a*) on which entry is prohibited under *The Trespass to Property Act, 1979*; or

(*b*) for the purpose of a recreational activity that is not prohibited or that is permitted without payment of a fee,

shall be deemed to willingly assume all risks except the risk of dangers created by the occupier with the deliberate intent of doing harm or damage to persons or property and the risk of damage from acts of the occupier done with reckless disregard of the presence of the person.

Idem

(3) The lands referred to in subsection 2 are,

(*a*) land used for agricultural purposes, including land under cultivation, orchards, pastures and woodlots;

(*b*) vacant or undeveloped land;

(*c*) forested or wilderness land;

(*d*) golf courses in winter;

(*e*) unused or abandoned railway beds;

(*f*) utility rights-of-way and corridors, excluding structures located thereon;

(*g*) undeveloped road allowances;

(*h*) private roads reasonably marked by notice as such;

(*i*) marked recreational trails.

Criminal activity

(4) For the purposes of subsection 1, a person who is on premises with the intention of committing, or in the commission of, a criminal act shall be deemed to have willingly assumed all risks except the risk of dangers created by the occupier with the deliberate intent of doing harm or damage to persons or property and the risk of damage from acts of the occupier done with reckless disregard of the presence of the person.

Restriction of duty or liability

5.—(1) The duty of an occupier under this Act, or his liability for breach thereof, shall not be restricted or excluded by the provisions of any contract to which the person to whom the duty is owed is not a party, whether or not the occupier is bound by the contract to permit such person to enter or use the premises.

Extension of liability by contract

(2) A contract shall not by virtue of this Act have the effect, unless it expressly so provides, of making an occupier who has taken reasonable care, liable to any person not a party to the contract, for dangers due to the faulty execution of any work of construction, maintenance or repair, or other like operation by persons other than himself, his servants, and persons acting under his direction and control.

Reasonable steps to inform

(3) Where an occupier is free to restrict, modify or exclude his duty of care or his liability for breach thereof, he shall take reasonable steps to bring such restriction, modification or exclusion to the attention of the person to whom the duty is owed.

Liability where independent contractor

6.—(1) Where damage to any person or his property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances he had acted reasonably in entrusting the work to the independent contractor, if he had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken.

Idem

(2) Where there is more than one occupier of premises, any benefit accruing by reason of subsection 1 to the occupier who employed the independent contractor shall accrue to all occupiers of the premises.

Idem

(3) Nothing in this section affects any duty of the occupier that is non-delegable at common law or affects any provision in any other Act that provides that an occupier is liable for the negligence of an independent contractor.

Application of ss. 5 (1, 2), 6

7. In so far as subsections 1 and 2 of section 5 prevent the duty of care owed by an occupier, or liability for breach thereof, from being restricted or excluded, they apply to contracts entered into both before and after the commencement of this Act, and in so far as section 6 enlarges the duty of care owed by an occupier, or liability for breach thereof, it applies only in respect of contracts entered into after the commencement of this Act.

Obligations of landlord as occupier

8.—(1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show towards any person or the property brought on the premises by those persons, the same duty of care and respect of dangers arising from any failure on his part in carrying out his responsibility as is required by this Act to be shown by an occupier of the premises.

Idem

(2) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to a person unless his default is such as to be actionable at the suit of the person entitled to possession of the premises.

Interpretation

(3) For the purposes of this section, obligations imposed by any enactment by virtue of a tenancy shall be treated as imposed by the tenancy, and "tenancy" includes a statutory tenancy, an implied tenancy and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.

Application of section

(4) This section applies to all tenancies whether created before or after the commencement of this Act.

Preservation of higher obligations

9.—(1) Nothing in this Act relieves an occupier of premises in any particular case from any higher liability or any duty to show a higher standard of care that in that case is incumbent on him by virtue of any enactment or rule of law imposing special liability or standards of care on particular classes of persons including, but without restricting the generality of the foregoing, the obligations of,

R.S.O. 1970, c. 223

(*a*) innkeepers, subject to *The Innkeepers Act*;

(*b*) common carriers;

(*c*) bailees.

(2) Nothing in this Act shall be construed to affect the rights, duties and liabilities resulting from a master and servant relationship where it exists. Master and servant relationships

(3) The provisions of *The Negligence Act* apply with respect to cause of action to which this Act applies. Application of R.S.O. 1970, c. 296

10.—(1) This Act binds the Crown, subject to *The Proceedings Against the Crown Act*. Act binds Crown R.S.O. 1970, c. 365

(2) This Act does not apply to the Crown or to any municipal corporation, where the Crown or the municipal corporation is an occupier of a public highway or a public road. Exception

11. This Act does not affect rights and liabilities of persons in respect of causes of action arising before this Act comes into force. Application of Act

12. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor. Commencement

13. The short title of this Act is *The Occupiers' Liability Act, 1979*. Short title

Appendix C
Discussion Draft of Proposed Trespass to Property Act

This draft Act has been drafted for discussion purposes only. Individuals and groups are invited to consider the draft Act and to send written submissions regarding it to the Ministry of the Attorney General before June 30th, 1979.

BILL **1979**

An Act to protect against Trespass to Property

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. In this Act, Interpretation

(*a*) "occupier" includes,

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

notwithstanding there is more than one occupier of the same premises;

(*b*) "premises" means lands and structures, or either of them, and includes,

(i) ships and vessels,

(ii) trailers and portable structures designed or used for residence, business or shelter,

(iii) trains, railway cars, vehicles and aircraft, except while in operation.

2.—(1) Every person who, Trespass an offence

(*a*) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engages in an activity on premises when the activity is prohibited under this Act; or

(*b*) does not leave the premises immediately after he is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than $1,000.

Colour of right as a defence

(2) It is a defence to a charge under subsection 1 in respect of premises that is land that the person charged reasonably believed that he had title to or an interest in the land that entitled him to do the act complained of.

Prohibition of entry

3.—(1) Entry on premises may be prohibited by notice to that effect and entry is prohibited without any notice on premises,

(*a*) that is a garden, lawn, field under cultivation or orchard; or

(*b*) that is enclosed in a manner that indicates the occupier's intention to keep persons off the premises or to keep animals on the premises.

Implied permission to use approach to door

(2) There is a presumption that access for lawful purposes to the door of a building on premises by a means apparently provided and used for the purpose of access is not prohibited.

Limited permission

4.—(1) Where notice is given that one or more particular activities are permitted, all other activities and entry for the purpose are prohibited and any additional notice that entry is prohibited or a particular activity is prohibited on the same premises shall be construed to be for greater certainty only.

Limited prohibition

(2) Where entry on premises is not prohibited under section 3 or by notice that a particular activity is permitted under subsection 1, and notice is given that a particular activity is prohibited, that activity and entry for the purpose is prohibited and all other activities and entry for the purpose are not prohibited.

Method of giving notice

5.—(1) A notice under this Act may be given,

(*a*) orally or in writing;

(*b*) by means of signs posted so that a sign is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies; or

(*c*) by means of the marking system set out in section 7.

(2) Substantial compliance with clause *b* or *c* of subsection 1 is sufficient notice. Substantial compliance

6.—(1) A sign naming an activity or showing a graphic representation of an activity is sufficient for the purpose of giving notice that the activity is permitted. Form of sign

(2) A sign naming an activity with an oblique line drawn through the name or showing a graphic representation of an activity with an oblique line drawn through the representation is sufficient for the purpose of giving notice that the activity is prohibited. Idem

7.—(1) Red markings made and posted in accordance with subsections 3 and 4 are sufficient for the purpose of giving notice that entry on the premises is prohibited. Red markings

(2) Yellow markings made and posted in accordance with subsections 3 and 4 are sufficient for the purpose of giving notice that entry is prohibited except for the purpose of certain activities and shall be deemed to be notice of the activities permitted. Yellow markings

(3) A marking under this section shall be of such a size that a circle ten centimetres in diameter can be contained wholly within it. Size

(4) Markings under this section shall be so placed that a marking is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies. Posting

8.—(1) A provincial offences officer or the occupier of premises or person authorized by him may require any person whom he believes on reasonable and probable grounds to be on the premises in contravention of section 2 to identify himself for the purpose of commencing a proceeding. Identification of trespasser

(2) Where a person who is required to identify himself under subsection 1 fails or refuses to do so, or there are reasonable grounds to believe that the identification given is false, the provincial offences officer or the occupier or person Arrest without warrant

authorized by him may arrest the person without warrant for the purpose of establishing his identity.

Idem

(3) Where the person who makes an arrest under subsection 2 is not a police officer, he shall forthwith deliver the person arrested to a police officer.

Motor vehicles R.S.O. 1970, c. 202

9. Where an offence under this Act is committed by means of a motor vehicle, as defined in *The Highway Traffic Act*, the driver of the motor vehicle is liable to the fine provided under this Act and, where the driver is not the owner, the owner of the motor vehicle is also liable to the fine provided under this Act unless, at the time the offence was committed, the motor vehicle was in the possession of a person other than the owner without the owner's consent.

Damage award

10.—(1) Where a person is convicted of an offence under section 2, and a person has suffered damage caused by the person convicted during the commission of the offence, the court shall, on the request of the prosecutor and with the consent of the person who suffered the damage, determine the damages and shall make a judgment for damages against the person convicted in favour of the person who suffered the damage, but no judgment shall be for an amount in excess of $1,000.

Costs of prosecution

(2) Where a prosecution under section 2 is conducted by a private prosecutor, and the defendant is convicted, unless the court is of the opinion that the prosecution was not necessary for the protection of the occupier or his interests, the court shall determine the actual costs reasonably incurred in conducting the prosecution and, notwithstanding section 61 of *The Provincial Offences Act, 1979*, shall order those costs to be paid by the defendant to the prosecutor.

1979, c. 4

Damages and costs in addition to fine

(3) A judgment for damages under subsection 1, or an award of costs under subsection 2, shall be in addition to any fine that is imposed under this Act.

Civil action

(4) A judgment for damages under subsection 1 extinguishes the right of the person in whose favour the judgment is made to bring a civil action against the person convicted arising out of the same facts.

Enforcement

(5) The judgment for damages under subsection 1, and the award for costs under subsection 2, may be filed in a small claims court and shall be deemed to be a judgment or order of that court for the purposes of enforcement.

Repeal

11. *The Petty Trespass Act*, being chapter 347 of the Revised Statutes of Ontario, 1970, is repealed.

12. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor. Commencement

13. The short title of this Act is *The Trespass to Property Act, 1979*. Short title

Appendix D
Existing Petty Trespass Act

1.—(1) Every person who unlawfully enters or in any other way trespasses upon another person's land, Offence of petty trespass

(*a*) that is enclosed;

(*b*) that is a garden or lawn; or

(*c*) with respect to which he has had notice by word of mouth, or in writing, or by posters or sign boards so placed as to be visible from every point of access to the land, not to trespass,

and whether or not any damage has been occasioned thereby, is guilty of an offence and on summary conviction is liable to a fine of not less than $10 and not more than $100. R.S.O. 1960, c. 294, s. 1 (1); 1960-61, c. 74, s. 1.

(2) Where an offence under subsection 1 is committed by means of a motor vehicle, the driver of the motor vehicle, not being the owner, is liable to the fine provided under subsection 1 and the owner of the motor vehicle is also liable to the fine provided under subsection 1 unless at the time the offence was committed the motor vehicle was in the possession of a person other than the owner or his chauffeur without the owner's consent. R.S.O. 1960, c. 294, s. 1 (2). Trespass by means of motor vehicle

2. Every person found committing such a trespass may be apprehended without warrant by any peace officer, or by the owner of the land on which it is committed, or the servant of, or any person authorized by such owner, and be forthwith taken before the nearest justice of the peace to be dealt with according to law. R.S.O. 1960, c. 294, s. 2. Arrest of trespasser without warrant

3. Nothing in this Act authorizes any justice of the peace to hear and determine a case of trespass in which the title to land, or to any interest therein, is called in question or affected, but every such case shall be dealt with according to law in the same manner as if this Act had not been passed. R.S.O. 1960, c. 294, s. 3. Saving cases involving title to land

4. Nothing in sections 1 and 2 extends to a case where the person trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, or to a case within section 373 of the *Criminal Code* (Canada). R.S.O. 1960, c. 294, s. 4. Saving persons claiming a right 1953-54, c. 51 (Can.)

By-laws to declare boundaries in marshes

5. The council of a township may pass by-laws for declaring that in the case of land, the boundary line or any part of the boundary line of which passes through a marsh or swamp or any land covered with water, the land, so far as respects that part of the boundary line that so passes, shall be deemed to be wholly enclosed within the meaning of this Act if posts are maintained along such part at intervals that permit of each post being clearly visible from the next post. R.S.O. 1960, c. 294, s. 5.